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No. 08-67

IN THE
Supreme Court of the United States

F. SCOTT YEAGER,
Petitioner,
v.
THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE CRIMINAL LAW PROFESSORS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, when a jury acquits a defendant on multiple counts but fails to reach a verdict on other counts that share a common element, and, after a complete review of the record, the court of appeals determines that the only rational basis for the acquittals is that an essential element of the hung counts was determined in the defendant's favor, collateral estoppel bars a retrial on the hung counts.

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BRIEF OF *AMICI CURIAE* CRIMINAL LAW PROFESSORS IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

This case concerns an issue of profound importance in the area of criminal law and procedure—the extent to which the government may bring successive prosecutions in derogation of the findings that underlie a prior jury verdict of "not guilty." The undersigned *amici* are professors of criminal law and criminal procedure and have a particular interest in the correct interpretation of the Constitution's safeguards for the accused, including the

protections of the Fifth Amendment's Double Jeopardy Clause. As scholars in the field, *amici* have a unique perspective on the rules, traditions, and practices in this area, as well as a strong interest in ensuring their consistent and proper application. A list of *amici* is set forth as an appendix to this brief. App., *infra*, 1a-2a.[1]

STATEMENT OF THE CASE

The jury in this case reached a verdict on many of the charges against petitioner, finding him "not guilty" on count after count. There is no dispute that, if this Court accepts that verdict as rational and treats the determinations underlying it as binding, the government would be precluded from prosecuting petitioner on the charges at issue here. The jury, in reaching a unanimous verdict of "not guilty" on various charges in the first trial, necessarily found that the government had failed to prove certain facts; those same facts are also essential elements of the offense the government seeks to prosecute in a second trial. The sole question in this case is whether the jury's unanimous verdict of "not guilty" somehow loses its preclusive effect—whether it no longer warrants full respect—because the jury also failed to reach a verdict (*i.e.*, it hung) on other charges that include the same essential element.

I. Factual Background

Petitioner F. Scott Yeager worked as an executive at Enron Broadband Services ("EBS"), the Enron Corporation's broadband and telecommunications unit. The

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[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person or persons other than *amici* and their counsel made such a monetary contribution. Both parties have consented to the filing of this brief. The parties' letters so consenting have been filed with the Clerk's office.

United States indicted petitioner as well as other EBS senior executives, "alleg[ing] that [they] purposely sought to deceive the public by making false statements about EBS's progress and financial condition." Pet. App. 3a. The government alleged that they "made false claims in various press releases beginning in 1999 and at Enron's annual analyst conference in January 2000." *Id.* at 3a-4a. The indictment also averred that various defendants sold "millions of dollars of Enron stock while making these false statements." *Id.* at 4a.

Based on those allegations, the government charged petitioner with one count of conspiracy to commit securities fraud and wire fraud; one count of the substantive offense of securities fraud; four counts of the substantive offense of wire fraud in connection with press releases issued by EBS from January 31, 2000 through May 15, 2000; 20 counts of insider trading arising from his decisions to sell Enron stock that he owned; and 99 counts of money laundering. Pet. App. 3a & n.2.

II. Proceedings Below

A. Proceedings In The District Court

At trial, the government's theory was that petitioner and the other defendants "all participated in a single conspiracy aimed at falsely portraying the technological capabilities, value, revenue, and business performance of Enron Broadband Services." Pet. App. 50a-51a. According to the government, "the objective of the conspiracy was to increase the price of Enron stock, so that the Defendants could personally enrich themselves through stock sales, salary and performance bonuses." *Id.* at 51a. After an almost three-month trial, the jury acquitted petitioner of conspiracy to commit securities fraud and wire fraud, securities fraud, and all four wire-fraud counts. *Id.* at 31a. The jury hung, however, on the in-

sider-trading and money-laundering counts, "indicat[ing] that they were hopelessly deadlocked." *Ibid.*

The government then reindicted petitioner (in an Eighth Superseding Indictment) on insider-trading and money-laundering charges. Pet. App. 31a. Petitioner moved to dismiss, arguing that the jury's verdict of acquittal barred the government from trying him on the same set of operative facts. *Id.* at 34a-36a. The district court rejected that argument. The court observed "that 'collateral estoppel bars relitigation only of those facts necessarily determined in the first trial.'" *Id.* at 37a (quoting *United States* v. *Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997)). But it expressed concern that "the determination of what the jury necessarily decided can be an 'awkward' task, because 'a general verdict of acquittal does not specify the facts "necessarily decided" by the jury.'" *Id.* at 38a (quoting *Brackett*, 113 F.3d at 1399).

After analyzing the defense's theory at trial, the prosecution's theory, and the evidence, the district court found "that the jury necessarily determined that [petitioner] did not knowingly and wilfully participate or agree to participate in a scheme to defraud in connection with the alleged false statements or material omissions made at the analyst conference and press releases." Pet. App. 59a. The district court nonetheless rejected petitioner's claim because, in its view, the government could prevail on the charges in the Eighth Superseding Indictment even if one accepted such a finding as true. Petitioner's "acquittal on the conspiracy, securities fraud, and wire fraud counts of the Indictment," the court held, "does not completely bar the government from retrying [petitioner] on the charges of insider trading and money laundering." *Ibid.*

B. Proceedings In The Court Of Appeals

The Fifth Circuit affirmed. Pet. App. 1a-28a. Like the district court, the court of appeals recognized that "[t]he Fifth Amendment's guarantee against double jeopardy incorporates the collateral estoppel doctrine." *Id.* at 5a (citing *Ashe* v. *Swenson*, 397 U.S. 436, 443-444 (1970)). In determining "whether collateral estoppel bars a subsequent criminal prosecution," the Fifth Circuit stated, "courts must conduct a two-step analysis": First, they must "decide which facts necessarily were decided in the first proceeding"; then, they must "consider whether the facts necessarily decided in the first trial constitute essential elements of the offense in the second trial." *Id.* at 6a-7a (quoting *Bolden* v. *Warden*, 194 F.3d 579, 584 (5th Cir. 1999)).

The court of appeals concluded that the district court's determinations on the first step fell short. Analyzing the record and the law together, the Fifth Circuit concluded that petitioner "is correct that the jury, acting rationally, could have acquitted [him] on securities fraud *only by concluding that he did not have insider information*." Pet. App. 18a (emphasis added). The court explained that "the jury could have acquitted [petitioner] of securities fraud for two reasons: (1) there were no material misrepresentations or omissions made at the conference; or (2) [petitioner] did not knowingly make misrepresentations or omissions because he believed the presentations were truthful." *Id.* at 21a. "Under either rationale," the court stated, "the jury must have found when it acquitted [petitioner] that [petitioner] himself did not have any insider information that contradicted what was presented to the public." *Ibid.*

The Fifth Circuit did not dispute that, if the determination that petitioner did not have insider information was taken as conclusive, the Double Jeopardy Clause would bar the government from retrying petitioner on

the insider-trading and money-laundering charges. Possession of material, non-public information is an element of insider trading. And the money-laundering charges were wholly derivative of the insider-trading counts. The finding that petitioner lacked material, non-public information, the Fifth Circuit thus conceded, "seemingly [represents] a finding that precludes the Government from now prosecuting him on insider trading and money laundering." Pet. App. 21a. "[C]onsider[ing] *the acquittals by themselves*, it appears that [petitioner] *is correct that collateral estoppel bars a retrial.*" *Id.* at 21a-22a (emphasis added).[2]

The Fifth Circuit nonetheless ruled "that collateral estoppel, under [its] precedent, d[id] not bar a retrial in this case" because petitioner "was also charged with insider trading and money laundering and the jury hung on those counts." Pet. App. 18a. The "problem in this case," the court opined, is that the jury's inability to resolve the insider-trading and money-laundering counts conflicts with its verdict on the other counts. *Id.* at. 22a. The court stated that, if the jury found that petitioner did not have insider information, "then the jury, acting rationally, would also have acquitted [petitioner] of the insider trading counts." *Ibid.* This "potential inconsistency" made it "impossible" for the court "to decide with any certainty what the jury necessarily determined." *Ibid.* The court of appeals thus took "into consideration the mistried counts" and found the jury's indecision on those counts to be dispositive. *Id.* at 23a (citing *United*

[2] The court of appeals analyzed the jury's findings based solely on the securities fraud verdict, ignoring the other acquittals. As the court of appeals explained, the jury's finding that petitioner "did not possess insider information" in acquitting him of securities fraud made it "unnecessary for [the court of appeals] to determine whether the jury made the same conclusion when it acquitted [petitioner] of the other counts." Pet. App. 22a n.20.

States v. *Larkin*, 605 F.2d 1360, 1370 (5th Cir. 1979), *withdrawn in part on other grounds*, 611 F.2d 585 (5th Cir. 1980)).

The court of appeals analyzed "four possible explanations" for the putative "discrepancy" between the acquittal on securities fraud and the mistrial on the insider-trading and money-laundering counts, but eventually concluded that "it is impossible to determine why the jury hung." Pet. App. 24a. Relying on the perceived impossibility of reconciling the jury's verdict on the fraud counts with the jury's failure to reach a verdict on the other counts, the Fifth Circuit held that petitioner had not carried his burden of establishing that the jury had necessarily found a particular, necessary element unproved in the prior case, and it declined to apply collateral estoppel to bar the reprosecution. *Id.* at 24a-25a.[3]

SUMMARY OF ARGUMENT

I. The Double Jeopardy Clause reflects one of the oldest and most fundamental rules of criminal law—the "universal and humane principle * * * 'that no man shall be brought into danger more than once for the same offense.'" *Ball* v. *United States*, 163 U.S. 662, 668 (1896) (quoting *People* v. *Barrett*, 1 Johns. 66, 74 (N.Y. Sup. Ct. 1806) (Livingston, J., dissenting)).

A. That rule traces back to ancient times and serves important interests. It manifests our society's respect for the finality and sanctity of a jury's verdict of acquittal. It prevents the State from using its enormous

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[3] While the court of appeals stated that a mistried count functions as only one factor to be weighed in Fifth Amendment analysis, the court gave dispositive weight to that factor. The United States thus has agreed that it is possible that "the analysis adopted by the court of appeals will in practice produce the same result as a categorical rule that collateral estoppel never applies in mixed verdict cases." U.S. Br. 14 n.4.

resources to subject the accused to an endless string of stigmatizing accusations that impose not only financial but also emotional hardships. And it guards against the possibility that retrial after retrial may eventually introduce the gravest insult to our system of criminal justice—conviction of the innocent.

B. There is no dispute that the jury in this case unanimously returned a verdict of "not guilty" on the securities fraud charges. Nor is there any dispute that, if one accepts that verdict as rational, it would preclude petitioner's reprosecution here. The Fifth Circuit, however, declined to accept the jury's verdict as binding because the jury also hung—it failed to reach a verdict—on several counts; the Fifth Circuit viewed those two results as conflicting. That reasoning and result cannot be reconciled with the principle that a jury speaks only through its verdict—its unanimous pronouncement. Failure to reach a verdict, by contrast, is the *absence* of a decision; it represents no findings of the jury. It is in effect a nullity, a non-event. To permit a non-verdict to disturb the otherwise preclusive effect of a unanimous verdict ignores the historical significance of verdicts while at the same time according unprecedented legal effect to a non-verdict.

C. The Fifth Circuit's decision also ignores the special historical significance of acquittals. Whatever may be said of the special status of unanimous jury verdicts generally—they represent the voice of the jury—*acquittals* historically have had special significance. The Fifth Circuit's decision, by denying preclusive effect to a verdict of acquittal, simply cannot be reconciled with the unparalleled status of finality the law has historically given acquittals.

D. The Fifth Circuit's decision undermines the very interests the Double Jeopardy Clause was meant to protect: It undermines the individual's ability to take

repose after being found "not guilty" by a jury of peers; it subjects the individual to multiple trials for the same underlying conduct; and, by allowing the government to submit its case to multiple juries in the hope that it can eventually make the case stick, the decision increases the likelihood that an innocent defendant will eventually be convicted through fluke juror error.

II. Modern changes in criminal procedure and criminal law underscore the need to scrupulously honor the historic purposes of the Double Jeopardy Clause.

A. Mistrials due to juror deadlock were virtually non-existent in the Framing era, but are now commonplace. The increased prevalence of mistrials already means that many defendants must undergo the trauma and expense of multiple trials. The protection against multiple trials should not be further eroded by denying actual verdicts of "not guilty" their preclusive effect.

B. The explosive growth in overlapping felonies also underscores the need to accord actual verdicts proper respect. In the Framing era, only one crime generally applied to a particular course of criminal conduct; the same basic conduct thus would rarely constitute multiple crimes that could be prosecuted separately. Today, by contrast, modern criminal codes include multiple, overlapping felonies, presenting a grave risk that defendants will be subject to multiple charges, and in some cases multiple prosecutions, based on the same conduct. Against that new landscape it would be particularly inappropriate to erode the preclusive effect of a jury's actual verdict based on the jury's non-decision on some counts.

ARGUMENT

The Double Jeopardy Clause of the Fifth Amendment reflects one of the most ancient and fundamental rules of criminal law—the "universal and humane principle * * *

'that no man shall be brought into danger more than once for the same offense.'" *Ball* v. *United States*, 163 U.S. 662, 668 (1896) (quoting *People* v. *Barrett*, 1 Johns. 66, 74 (N.Y. Sup. Ct. 1806) (Livingston, J., dissenting)). Predating the Framing, the common law, and Roman law, that prohibition is embodied in laws as ancient as those of Athens (*circa* 300 B.C.) and potentially traceable to biblical sources as well.

The prohibition against subjecting the accused to multiple trials for the same offense serves important interests. It manifests our society's respect for the finality and sanctity of a jury's verdict of acquittal. It prevents the State from using its enormous resources to subject the accused to an endless string of stigmatizing accusations that impose not only financial but also emotional hardships. And it guards against the possibility that retrial after retrial may eventually introduce the most grievous of errors in our system of criminal justice—conviction of the innocent.

There is no dispute that, if the jury's "not guilty" verdict in this case is treated as controlling on all matters the jury rationally must have resolved in reaching that verdict, petitioner cannot be tried on the insider-trading and money-laundering charges he currently confronts. The jury, in rationally finding petitioner "not guilty" of securities fraud, necessarily determined that there was insufficient proof that petitioner possessed material, nonpublic (*i.e.*, "insider") information. Pet. App. 21a. To try petitioner now on insider-trading charges, and derivative money-laundering charges, the government would in effect have to ask a second jury to revisit and contradict a necessary factual determination underlying the verdict of the first jury. That is something that the Double Jeopardy Clause does not permit.

The Fifth Circuit nonetheless ruled that, because the jury "hung" on the insider-trading and money-laundering

counts—it failed to reach a verdict on those charges—the jury's acquittal should not be viewed as having decided that petitioner lacked insider information. That, however, erroneously uses a non-verdict—the failure to reach a verdict on some counts—to impugn the integrity, scope, and effect of an actual jury verdict. That approach cannot be reconciled with the historical sanctity accorded to jury verdicts; with the historical finality accorded to acquittals in particular; or with the important purposes served by the Double Jeopardy Clause.

As a historical matter, the precise situation confronted here—an acquittal on some counts combined with a hung jury on others—would rarely if ever have arisen in the Framing era (or before). At the time of the Framing and under English common law, juries almost always reached verdicts because courts used potentially coercive means to ensure that result. Shortly after the Framing, however, courts departed from those practices and allowed mistrials based on deadlocked juries. By doing so, courts allowed defendants to be subjected to a second trial following an unsuccessful first trial. They justified that result—subjecting the defendant to a second trial before a new jury—under the rubric of "manifest necessity." This case, however, involves the effect of the jury's *actual verdict of acquittal* on certain counts. The fact that courts have now departed from the general rule barring successive retrials cannot justify a further innovation that allows courts to *impugn* the verdict the jury actually reached as irrational, or to disregard the findings that underlie it, based on inferences drawn from the counts on which the jury did not reach a verdict. It is one thing to allow a second trial where there is no prior verdict on the issues to be put before a second jury. But it is quite another to allow a second jury to revisit issues that an earlier jury rationally must have resolved against

the government in finding the defendant "not guilty" in the first trial.

I. Courts May Not Disregard The Otherwise Preclusive Effect Of A Verdict Of "Not Guilty" Based On The Jury's Failure To Reach A Verdict On Other Counts

A. The Double Jeopardy Clause Reflects Longstanding Principles That Serve Important Values

1. The Double Jeopardy Clause provides that "[n]o person shall * * * be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The constitutional protection against double jeopardy traces its roots back to ancient Rome and Greece as a particularized application of the maxim *nemo debet bis vexari pro una et eadem causa*—that no person shall be twice vexed for one and the same cause. See H. Broom, *A Selection of Legal Maxims Classified and Illustrated* 326, 346-350 (8th Am. ed. 1882). Justinian's *Corpus Juris Civilis* thus provided that "[t]he governor should not permit the same person to be again accused of a crime of which he has been acquitted." *The Digest or Pandects* 48.2.7.2, in 11 *The Civil Law* 17 (S.P. Scott trans., 1932). In the 4th century B.C., Demosthenes likewise observed that "the laws forbid the same man to be tried twice on the same issue, be it a civil action, a scrutiny, a contested claim, or anything else of the sort." Demosthenes, *Against Leptines*, in *Olynthiacs, Philippics, Minor Public Speeches, Speech Against Leptines* 589 (J.H. Vince trans., 1930).

The principle that no man may be tried twice for the same cause also has roots in the Bible. Justice Black traced the "opposition to double trials" found in canon law to "the reading given by St. Jerome in 391 A.D. to I Nahum 9 (Douay version), 'there shall not rise a double

affliction.' * * * Jerome drew from this rule that God does not punish twice for the same act." See *Bartkus* v. *Illinois*, 359 U.S. 121, 152 n.4 (1959) (Black, J., dissenting).[4]

By the time of the Framing, the prohibition on double jeopardy was also a well-established feature of English common law. It was a "universal maxim of the common law of England," Blackstone reports, that "no man is to be brought into jeopardy of his life, more than once, for the same offense." 4 W. Blackstone, *Commentaries on the Laws of England* 329 (1769). Criminal defendants confronting successive prosecutions could invoke the common-law pleas of *autrefois acquit* and *autrefois convict*. *Id.* at 329-330; *accord* 3 E. Coke, *Institutes of the Laws of England* 213-214 (1644). Describing *autrefois acquit*, Blackstone stated: "[W]hen a man [was] once fairly found not guilty upon any indictment, or other prosecution * * * he [could] plead such acquittal in bar of any subsequent accusation for the same crime." 4 Blackstone, *supra*, at 329; *accord* 3 Coke, *supra*, at 213-214. The plea of *autrefois convict* similarly operated to bar the Crown from prosecuting a defendant for an offense for which he had already been convicted. 4 Blackstone, *supra*, at 330.

Because only actual verdicts would trigger the protections of *autrefois acquit* and *autrefois convict*, the Crown's prosecutors during the Stuart monarchy developed the "'abhorrent' practice" of discharging a jury whenever it appeared that the Crown's evidence was too weak to produce a conviction. *Arizona* v. *Washington*, 434 U.S. 497, 507-508 & n.23 (1978) (quoting *State* v. *Garrigues*, 2 N.C. 188, 189 (1795)). After discharging the jury, the Crown would then re-indict the hapless defend-

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[4] The book of Nahum appears between Micah and Habakkuk in the Bible. Nahum is thought to have been written near the end of the Assyrian Empire in the 7th century B.C.

ant "at a future day," having had the opportunity to muster "better evidence against him." *Id.* at 508 n.23 (internal quotation marks omitted) (quoting *Garrigues*, 2 N.C. at 189). The English courts promptly curbed that "instrument of tyrannical oppression," *Queen* v. *Charlesworth*, 121 Eng. Rep. 786, 801 (Q.B. 1861), by declaring that—at least in capital cases—"a juror cannot be withdrawn, though the parties consent to it * * * ." *King* v. *Perkins*, 90 Eng. Rep. 1122, 1122 (K.B. 1698).

Thus, at the time of Framing (and well before), the established rule was that, "'whenever, and by whatever means, there is an acquittal in a criminal prosecution, the scene is closed and the curtain drops.'" *United States* v. *Jenkins*, 490 F.2d 868, 872 n.6 (2d Cir. 1973) (quoting counsel in *Duchess of Kingston's Case*, 20 How. St. Tr. 355, 528 (1776)). That rule was then engrafted into the Bill of Rights through the Double Jeopardy Clause. See 1 *Annals of Cong.* 781-782 (J. Gales ed., 1789) (remarks of Rep. Livermore) (noting that the Double Jeopardy Clause was designed to be "declaratory of the law as it [then] stood"); see also *United States* v. *Scott*, 437 U.S. 82, 87 (1978) ("The origin and history of the Double Jeopardy Clause are hardly a matter of dispute.").

2. The longstanding proscription against double trials also precludes the government from seeking to prove to a second jury an element that has already been found absent by a jury at a previous trial. By 1776, the English courts took it as settled, in *Duchess of Kingston's Case*, that a prior judgment precluded relitigation of the same claims (*res judicata*) and relitigation of any issues necessarily resolved in reaching that judgment (issue-preclusion or collateral estoppel). The "judgment of a court of exclusive jurisdiction, directly upon the point" the court stated, "is in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different

purpose."[5] 20 How. St. Tr. at 535. By the 19th century, English courts pronounced that "the criminal law is in unison with that which prevails in civil proceedings," holding that a verdict in a prior criminal case would preclude the government from relitigating in later cases any issues the first jury necessarily decided, even where different charges were brought (and therefore a plea of *autrefois acquit* or *autrefois convict* would not apply in the strict sense). *Queen* v. *Miles*, 24 Eng. Rep. 423, 431 (Q.B. 1890).

This Court has reached the same conclusion. The Double Jeopardy Clause's prohibition on retrying a defendant following acquittal, the Court has held, also precludes the government from retrying any issue necessarily decided in the first trial. *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970). As Justice Holmes explained almost a century ago, it would make little sense to accord greater protection to the integrity and finality of a verdict in a civil matter than to a verdict of "not guilty" in a criminal case: "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." *United States* v. *Oppenheimer*, 242 U.S. 85, 87 (1916). Thus, "when an issue of ultimate fact has once been determined by a valid and final judgment" of acquittal, that issue "cannot again be litigated" against the defendant in connection with a separate, but factually related, offense. *Ashe*, 397 U.S. at 443.

3. The Double Jeopardy Clause protects important interests. In one sense, it protects the interest of finality—declaring the jury's determination to be the last

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[5] Although the doctrine of collateral estoppel has deep historic roots, the term "collateral estoppel" was first devised by the drafters of the Restatement (First) of Judgments § 68 (1942). See A.W. Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1, 3 & n.4 (1942).

word on the subject. Finality, of course, has long been considered essential to the administration of justice in an orderly society. "For unless every judgment should at some point become final, and have the quality of establishing its contents as irrefragable truth, litigation would become interminable, the rights of parties would be involved in endless confusion, the courts stripped of their most efficient powers, would become little more than advisory bodies, and thus the most important function of government—that of ascertaining and enforcing rights—would go unfulfilled." 2 H.C. Black, *A Treatise on the Law of Judgments* § 500 (1891).

In the criminal context, moreover, finality—and the sanctity of the jury's verdict—protects individual liberty. Criminal proceedings impose severe psychological and financial hardships. *Green* v. *United States*, 355 U.S. 184, 187 (1957). By protecting the finality and sanctity of a jury's verdict of acquittal, the Double Jeopardy Clause ensures that those accused of crimes but acquitted do not have to live in a "continuing state of anxiety and insecurity," never knowing when they might again be called on to endure the "embarrassment, expense, and ordeal" of another prosecution. *Ibid.*

The Double Jeopardy Clause also preserves the interests of accuracy and the right to trial by a jury of one's peers. It ensures that the government cannot circumvent the jury's solemn verdict by trying the case before jury after jury after jury until it obtains a verdict to its liking. And it guards against the ultimate injustice—the conviction of an innocent person. Serial prosecutions necessarily raise the risk that a jury will eventually convict whether that conviction is warranted or not. The Double Jeopardy Clause thus ensures that the government, "with all its resources and power," cannot "enhanc[e] the possibility that even though inno-

cent [a defendant] may be found guilty." *Green*, 355 U.S. at 187-188.

B. The Fifth Circuit's Decision Is Inconsistent With The Historic Sanctity Of A Jury's Verdict

The Fifth Circuit did not dispute that, consistent with historical practice, the Double Jeopardy Clause precludes the government from attempting to prove, before a second jury, the same issue an earlier jury necessarily resolved against it. The Fifth Circuit, however, relied on the jury's *failure to reach a verdict* on certain counts to deny the first jury's verdict of preclusive effect. That ruling cannot be reconciled with the historic sanctity accorded to jury verdicts. It disregards the special status that verdicts of acquittal have in our system of justice. And it wholly divorces the Double Jeopardy Clause from the important values it protects.

1. In our criminal justice system, the jury speaks *only* through its verdict. Even at the time of the Framing, the law flatly rejected efforts to impugn, narrow, or second-guess the verdict through other means—including efforts to impeach a jury's verdict with the support of the jurors themselves. For example, in *Vaise* v. *Delaval*, 99 Eng. Rep. 944 (K.B. 1785), juror affidavits revealed that the jury had arrived at its verdict by tossing a coin. Despite characterizing the jury's conduct as "a very high misdemeanor," Lord Mansfield refused to impeach the jury's verdict by considering the juror affidavits. *Id.* at 944. Early American courts widely adopted "Mansfield's Rule" against impeaching the jury's verdict by inquiring into deliberations. See 8 J.H. Wigmore, *Evidence in Trials at Common Law* § 2349, at 681-690 & n.2 (McNaughton rev. ed. 1961) (collecting early American cases).[6]

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[6] See also *Grinnel* v. *Phillips*, 1 Mass. 530, 542 (1805) (Sewall, J.) ("[T]he secret intention or mental act of a juror can never be a

That rule does not merely reflect the accepted notion that jury deliberations are confidential. It also reflects the principle that the jury speaks as a body *through its verdict*, and that efforts to impeach or otherwise diminish the verdict are not tolerated. Chief Justice Shaw, writing for the Supreme Judicial Court of Massachusetts, thus explained:

> [T]he general rule is that affidavits of jurors will not be received to prove any mistake of the evidence or misapprehension of the law, on the part of the jury. Different jurors, according to their different degrees of intelligence, of attention and habits of thought, may entertain different views of the evidence, and of the instructions of the court in point of law. *But the verdict, in which they all concur, must be the best evidence of their belief*, both as to the fact and the law, *and therefore must be taken to be conclusive*.

Murdock v. *Sumner*, 22 Pick. 156, 157 (Mass. 1839) (emphasis added). Thus, "the verdict as uttered is the *sole embodiment of the jury's act* and must stand as such without regard to the motives or beliefs which have led up to its act." 8 Wigmore, *supra*, § 2349, at 681 (emphasis added).

This Court has correspondingly prohibited efforts to inquire into jury deliberations for other purposes, such as determining which issues the jury necessarily decided. See *Packet Co.* v. *Sickles*, 72 U.S. 580, 593 (1866). That policy is so strong that this Court has refused to consider even a judge's testimony regarding the decision-making

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subject of legal inquiry."); *Wright* v. *Ill. & Miss. Tel.*, 20 Iowa 195, 1866 WL 140, at *8 (1866) ("[A]ffidavits of jurors will not be received to show the detail of the deliberations of the jury, or that they or one or more of them misunderstood the evidence or instructions, or did not agree to the verdict.").

process to show the meaning of a verdict in a bench trial. See *Fayerweather* v. *Ritch*, 195 U.S. 276, 306-307 (1904). Instead, any inquiry into the meaning of a verdict "should be confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration, and then the record, *which furnishes the only proper proof of the verdict.*" *Sickles*, 72 U.S. at 593 (emphasis added). In other words, the jury's *verdict* must be taken as the *embodiment* of a jury's rational application of the law to the facts. Courts determining the effect of that verdict must ask "whether a *rational jury* could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444 (emphasis added) (internal quotation marks omitted).

2. The Fifth Circuit's decision is inconsistent with those principles. The Fifth Circuit agreed that, if one accepts the jury's verdict of "not guilty" on the securities-fraud charge as rational, that verdict precludes retrial on the charges at issue here. As that court explained, the acquittal standing alone necessarily reflects the jury's finding that petitioner did not have inside information. See Pet. App. 21a-22a ("[C]onsidering the acquittals by themselves, it appears that [petitioner] is correct that collateral estoppel bars a retrial."). The Fifth Circuit, however, declined to accept the jury's verdict of "not guilty" on its face because, in its view, that verdict was inconsistent with the jury's *failure to reach a verdict* on the insider-trading charges. *Id.* at 24a-25a.

But that treats the absence of a verdict on certain counts as impugning the rationality of the verdict the jury did reach. The established rule is to the contrary: The jury's "*verdict, in which they all concur,* must be the *best evidence* of their belief, both as to the fact and the law, *and therefore must be taken to be conclusive*."

Murdock, 22 Pick. at 157 (emphasis added). The jury's verdict cannot be treated as less than conclusive merely because the jury failed to reach a verdict (and thus failed to concur) on other counts.

Treating the jury's failure to reach a verdict on certain counts as undermining the preclusive effect of the verdict the jury did issue is particularly problematic because the failure to reach a verdict is just that—the absence of decision, a nullity. It conveys no determinations of any sort. When it hangs, "the jury makes *no decision at all*." *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 117 (2003) (O'Connor, J., concurring) (emphasis added); *United States* v. *Ohayon*, 483 F.3d 1281, 1289 (11th Cir. 2007) ("[T]he failure of a jury to reach a verdict is not a decision; it is a failure to reach a decision."). Because the jury did not reach a verdict on the unresolved counts here, "the jury did not make any findings at all as to" those counts. *United States* v. *Fields*, 251 F.3d 1041, 1044 (D.C. Cir. 2001).[7] Nor is there any basis in history for treating the failure to reach a verdict as embodying any findings. There is no evidence that the jury's failure to reach a verdict on certain counts was accorded weight at the time of the Framing, if for no other reason than that juries virtually never hung in that era; to the contrary, juries were *required* to reach a verdict. See pp. 26-27, *infra*. And there certainly is no evidence that the common-law courts would have viewed a hung jury as grounds for questioning the rationality of the verdict the jury did reach, much less for limiting its otherwise preclusive scope.

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[7] Under the Sixth Amendment, moreover, jurors in federal cases must reach their verdict unanimously. *Andres* v. *United States*, 333 U.S. 740, 748 (1948). When a jury hangs on a count, that unanimity is absent.

The jury's failure to reach a verdict on certain counts thus is, in the eyes of the law, a non-unanimous nullity—a non-decision devoid of legal effect. Such a non-decision provides no basis for impugning the verdict the jury actually and unanimously reached. Nor is it grounds for refusing to give that verdict the weight and consequences that it would otherwise have. Courts may "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter" to determine "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444 (internal quotation marks omitted). But a court may not use a jury's *failure to reach a decision* to question the *rationality* of the jury's unanimous verdict and to deem it unworthy of respect (or to rest on no findings at all). The accused's constitutional rights must depend on what the jury says in its verdict. Those rights cannot depend on extrapolations from what the jury chose not to decide.[8]

C. The Fifth Circuit's Decision Is Inconsistent With The Historically Special Weight Given To Verdicts Of "Not Guilty"

Even apart from the impropriety of impugning a jury verdict by pointing to the indecision of a non-verdict, the Fifth Circuit's approach collides with the historically special status of verdicts of "not guilty," *i.e.*, acquittals.

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[8] It is, of course, a different matter when a jury returns conflicting *verdicts*, unanimously agreeing on outcomes that cannot be reconciled with each other. See *United States* v. *Powell*, 469 U.S. 57, 64-69 (1984). In such cases, respect for the jury's decision-making power requires courts to give effect to *both* verdicts, notwithstanding their inconsistency, and to deny preclusive effect to either verdict. See *id.* at 68-69. That, however, hardly justifies giving a non-verdict—a hung jury's failure to decide an issue—priority over the verdict of acquittal the jury actually and unanimously reached.

The Framers understood that judgments of acquittal (unlike conviction) are subject to a rule of "absolute finality," *Burks* v. *United States*, 437 U.S. 1, 16 (1978): "'[W]henever, and by whatever means, there is an acquittal in a criminal prosecution, the scene is closed and the curtain drops.'" *Jenkins*, 490 F.2d at 872 n.6 (quoting counsel in *Duchess of Kingston's Case*, 20 How. St. Tr. at 528).

It is that rule of absolute finality that precludes the government from appealing even in the face of legal error. Early common-law decisions permitted the Crown to appeal acquittals, but by the early 18th century that power was limited to instances where the error was plain from the face of the record or the defendant had obtained an acquittal through fraud. See M. Friedland, *Double Jeopardy* 286-287 (1969). Even then, appeals were heavily disfavored and rarely used. *Id.* at 286 & n.4. Canvassing the relevant authorities over a century ago, this Court observed that "from the time of Lord Hale * * * the text-books, with hardly an exception, either assume or assert that the defendant * * * is the only party who can have either a new trial or a writ of error * * * and that a judgment in his favor is final and conclusive." *United States* v. *Sanges*, 144 U.S. 310, 312 (1892).

Today, this Nation's courts continue to accord acquittals absolute finality, prohibiting government appeals from verdicts of not guilty.[9] As a result, it is now "one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an

[9] For years, the United States was prohibited by statute from appealing an acquittal under any circumstances. *Scott*, 437 U.S. at 88. Once Congress removed the statutory barriers to appeal by the United States, this Court confirmed that the Double Jeopardy Clause prohibits the government from appealing acquittals. *United States* v. *Wilson*, 420 U.S. 332, 353 (1975).

appeal" of a verdict of acquittal. *Green*, 355 U.S. at 188; see also *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) ("Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal * * * could not be reviewed * * * without putting [a defendant] twice in jeopardy.'" (quoting *Ball*, 163 U.S. at 671)).

Correspondingly, "the law attaches particular significance to an acquittal." *Scott*, 437 U.S. at 91; see also *United States* v. *DiFrancesco*, 449 U.S. 117, 129 (1980) ("An acquittal is accorded special weight."). Once "the innocence of the accused has been confirmed by a final judgment, the Constitution *conclusively presumes* that a second trial would be unfair." *Washington*, 434 U.S. at 503 (emphasis added).[10] That contrasts sharply with the legal treatment of convictions and mistrials. Unlike acquittals, convictions are not absolutely final; they are appealable, and reversal can result in a second trial.[11] Mistrials producing no verdict have an even lesser status. At common law, they were given no effect at all: Jeopardy did not attach until trial was completed and a final verdict was rendered. See *Vaux's Case*, 76 Eng. Rep.

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[10] That rule applies whether an acquittal is granted by jury or judge, *Martin Linen*, 430 U.S. at 571, or at trial or on appeal, *Burks*, 437 U.S. at 18, and whether or not there is reason to doubt the soundness of the acquittal, *Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962).

[11] A verdict of guilty, unlike an acquittal, does not automatically terminate jeopardy and thereby prevent the defendant from being tried again for the same offense. See *Justices of Boston Mun. Ct.* v. *Lydon*, 466 U.S. 294, 308 (1984) ("Acquittals, unlike convictions, terminate the initial jeopardy."). Accordingly, where a defendant successfully appeals a conviction on grounds unrelated to the sufficiency of the evidence, "it has long been settled * * * that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying [him]." *Lockhart* v. *Nelson*, 488 U.S. 33, 38 (1988).

992, 992 (K.B. 1591); M. Hale, *Pleas of the Crown* 244-245 (5th ed. 1716). Consequently, the double-jeopardy protections embodied in the pleas of *autrefois acquit* and *autrefois convict* were strictly limited to cases that resulted in verdicts; there was no plea of *autrefois sans verdict*. See *Crist* v. *Bretz*, 437 U.S. 28, 33 (1978); 3 J. Story, *Commentaries on the Constitution of the United States* § 1781, at 659-660 (1833).

While it is now established that jeopardy attaches when the jury is empanelled—and that a mistrial may therefore preclude retrial—the jury's failure to reach a verdict still lacks the absolute status of an acquittal. Retrial remains permissible if discharging the jury is a "manifest necessity." *Washington,* 434 U.S. at 503, 514-516; *United States* v. *Dinitz*, 424 U.S. 600, 606-611 (1976) (holding that a defendant may be retried after a mistrial where a defendant moves for a mistrial, unless it can be shown that the government purposefully provoked the defendant's request). Even today, the consequences are "definitely [different] in cases where the trial has not ended in an acquittal." *DiFrancesco*, 449 U.S. at 130.

The Fifth Circuit's decision is impossible to reconcile with the "particular significance" and "absolute finality" the law attaches to verdicts of "not guilty." In this case, the jury unanimously concluded that petitioner was not guilty of certain offenses; standing alone, that verdict necessarily would have precluded a second trial on the insider-trading and money-laundering counts the United States now seeks to bring. Even if one were to assume that the jury's failure to reach a verdict on the insider-trading and money-laundering counts in the first trial has any status in the eyes of the law (and it does not, see pp. 19-21, *supra*) that failure to agree unanimously lacks the special significance and absolute finality this Court traditionally accords verdicts of acquittal. Whatever the mistried counts' impact in other contexts, they provide no

basis for denying the acquittal verdict the jury did issue its ordinary preclusive effect, and they surely cannot be used to impugn the rationality of the jury's actual verdict. Because the Fifth Circuit did those things nonetheless, its judgment cannot stand.

D. The Fifth Circuit's Decision Undermines The Double Jeopardy Clause's Historic Mission

The Double Jeopardy Clause guarantees a defendant, first and foremost, that he will not be forced to defend himself again after twelve of his peers unanimously find that the government did not prove him guilty. The Fifth Circuit's decision undercuts that historical guarantee and threatens to produce precisely the results that the Double Jeopardy Clause protects against—seriatim trials at which the government, dissatisfied with the findings of the first jury, seeks a different result before another. In doing so, it exposes the accused to precisely the anxiety and insecurity the Double Jeopardy Clause was designed to prevent.

The Fifth Circuit's decision, moreover, denies the jury's verdict the sanctity the law traditionally accords it. Even though a unanimous jury determined that petitioner is not guilty of securities fraud—and that verdict rationally must encompass a finding that petitioner lacked insider information—the Fifth Circuit would allow the government to pursue petitioner yet again on the theory that the first jury in effect erred in its finding or was irrational. Finally, the Fifth Circuit's decision to give the government multiple bites at the apple dramatically increases the risk of convicting the innocent. See *Green*, 355 U.S. at 188. One jury has now determined that petitioner did not have insider information. There is no guarantee that the next jury will decide that issue more accurately. And if the same issue is put to a sufficient number of juries, the likelihood of an erroneous conviction rises markedly.

II. Modern Changes To Our System Of Criminal Justice Underscore The Importance Of Double Jeopardy Rights In This Context

While the history and origins of the Double Jeopardy Clause all but foreclose the Fifth Circuit's approach, changes in criminal procedure and our criminal laws underscore the necessity of according jury verdicts of "not guilty" preclusive effect in later prosecutions. At the time of the Framing, hung juries were a rarity, and felony offenses were relatively few and discrete. There was thus little risk that a defendant would end up being tried twice—or more—for the same underlying conduct. Today, by contrast, it is not uncommon for juries to hang, and the U.S. Code (to say nothing of state law) contains a dizzying array of often overlapping criminal prohibitions. Allowing for hung juries, and thus multiple trials for a single offense, may be a "manifest necessity" and thus tolerable notwithstanding the express prohibitions of the Double Jeopardy Clause. But that limited innovation cannot provide grounds for further eroding double-jeopardy protections by licensing courts to disregard the otherwise preclusive impact of a judgment of acquittal.

A. The "Manifest Necessity" Of New Trials In Cases Involving Deadlocked Juries Cannot Justify Disregarding The Impact Of The Verdict The Jury Did Reach

At English common law, juries were largely precluded from failing to reach a verdict. Blackstone reported that "the jury cannot be discharged till they have given in their verdict." 4 Blackstone, *supra*, at 354. The practices of the era went to great lengths to ensure that a verdict would be reached. Jurors could be deprived of "meat, drink, fire, or candle * * * till they * * * all unanimously agreed." 3 Blackstone, *supra*, at 375. Where those measures did not succeed in producing a verdict, the courts sometimes turned to imprisonment. *Id.* at 376.

And, if that did not work, the presiding judge could carry the jurors "round the circuit from town to town in a cart" until a unanimous decision was reached. *Ibid.*

Similar practices were utilized in early America. See 38 Ill. Rev. Stat. § 745 (repealed Jan. 1, 1964) (requiring that criminal juries be kept "without meat or drink (water excepted) * * * until they shall have agreed upon their verdict"); S. Kassin, *The American Jury: Handicapped in the Pursuit of Justice*, 51 Ohio St. L.J. 687, 709 (1990) ("Judges used to urge deadlocked juries to resolve their disagreements through such coercive measures as the denial of food and drink, excessive deliberation hours, and the threat of confinement."). As a result, mistrials were virtually non-existent at the time of the Framing. In the middle of the 18th century, for example, Virginia saw fewer than one jury per year fail to reach a verdict. D. Blinka, *The Virginia Experience*, 71 U.M.K.C. L. Rev. 529, 580 (2003). The rate of hung juries was even lower in colonial New Jersey, where not one jury hung in a criminal case between 1749 and 1757. See G. Thomas, *Colonial Criminal Law & Procedure: The Royal Colony of New Jersey, 1749-57*, 1 N.Y.U. J.L. & Liberty 671, 703-704 tbl.1 (2005). And in the federal court system, the first known mistrial resulting from jury deadlock did not occur until 1807. See *United States* v. *Workman*, 28 F. Cas. 771 (D. La. 1807). Not until 1824 did this Court definitively declare that a jury could be discharged before verdict in situations of "manifest necessity." See *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).

Courts, of course, have properly abandoned the coercive techniques that tended to prevent juror deadlock in the Framing era. As a result, however, juries now find themselves unable to reach verdict in a startlingly large number of cases. In the 1950s, for example, jury deadlocks led to mistrials in approximately 5.5% of criminal

trials. H. Kalvin & H. Zeisel, *The American Jury* 56-57, tbl.11 (1966). More recent studies have produced similar results, and some jurisdictions have rates approaching 20 percent.[12]

Because courts cannot (and ought not) return to the coercive methods of avoiding juror deadlock that were employed at the time of the Framing, the judicial system has adapted. Retrials—a second trial for the same offense—are now a "manifest necessity" in cases where jurors deadlock. That is not without its costs: It seriously erodes the purposes underlying the Double Jeopardy Clause. It subjects the individual to multiple trials; prolongs his period of uncertainty and anxiety; and pits the individual of limited means repeatedly against a government of enormous resources. But the fact that our system now tolerates those erosions cannot justify further undermining constitutional protections by denying the jury's *actual verdict* of acquittal its otherwise preclusive effect. Yet that is what the Fifth Circuit did here.

B. The Explosive Growth Of Overlapping Felonies Underscores The Need To Give Actual Verdicts Proper Weight

The dangers to Double Jeopardy posed by serial retrials are exacerbated by the explosive growth of overlapping felonies in federal criminal law. At the time of the Framing, there was little risk that a defendant could face multiple criminal charges based on the same basic

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[12] According to a 2002 report conducted by the National Center for State Courts, 6.2% of state-court prosecutions result in a mistrial due to a hung jury. P. Hannaford-Agor, *et al.*, *Are Hung Juries a Problem?* 20 (2002), http://ncsonline.org/WC/Publications/Res_Juries_HungJuriesProblemPub.pdf. In Los Angeles, however, juries hang on at least one count in 19.5% of cases, while jurors in the District of Columbia hang on at least one count in 22.3% of cases. *Id.* at 41. In federal criminal cases, between 1980 and 1997, juries hung in approximately 2.1% to 3% of cases. *Id.* at 22.

conduct. Historically, "offense categories were relatively few and distinct." *Ashe*, 397 U.S. at 445 n.10. At the end of the 13th century, for example, apart from treason, there were only nine felony offenses. 2 F. Pollock & F.W. Maitland, *History of English Law* 470 (1898). During the era of Lord Coke, this number increased modestly to approximately 30. 2 J. Stephen, *A History of the Criminal Law of England* 219 (1883). By the time of the Framing, there were just 160 potential felony offenses. *Ibid.* Thus, "[a]t common law, and for a time after the adoption of the Constitution, one criminal act or a series of acts in a single plan was likely to yield only one offense." D. Mayers & F. Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 29 (1960).

The landscape has since changed dramatically. Criminal statutes have been enacted at an alarming rate, with ever-increasing overlap and specificity. See *Ashe* 397 U.S. at 455 n.10; see also Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 Yale L.J. 339, 344 (1956) ("The tendency of modern penal legislation has been toward more detailed specification of criminal offenses, so that a single criminal act or transaction comes under the proscription of a steadily increasing number of statutes."). The Justice Department has estimated that, in 1989, there were approximately 3,000 federal crimes on the books. See R. Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 Crim. L.F. 99, 110 (1989). By 2000, that number had jumped to over 4,000. J. Baker & D. Bennett, *Measuring the Explosive Growth of Federal Crime Legislation* 8 (2004). The nine years since have witnessed the creation of another 452 federal crimes—or about 56.5 crimes per year. J. Baker, *Revisiting the Explosive Growth of Federal Crimes* 1 (2008). "[O]f all federal crimes enacted

since 1865, over forty percent have been created since 1970." E. Meese & W. Taylor, ABA Task Force on the Federalization of Criminal Law, Preface, *The Federalization of Criminal Law* 2 (1998).

That explosion of criminal offenses, combined with their great specificity and overlap, now makes it "possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Ashe*, 397 U.S. at 445 n.10; see also *id.* at 452 (Brennan, J., concurring) ("Given the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening."). This Court, of course, cannot proscribe opportunistic charging decisions; the Executive Branch has sole authority to enforce the law. Nor can this Court rewrite and simplify the Nation's criminal laws; that task is within the purview of the legislature. But the Court ought not give the Double Jeopardy Clause a crabbed interpretation that prevents it from reaching the evils at which it was historically directed. The government is entitled to try a defendant once for a crime and, if the jury reaches no verdict at all, to try the defendant yet again. But when the jury does reach a verdict of "not guilty" on one of the many overlapping crimes that Congress has created and the Executive has chosen to prosecute, the Court should accord *that verdict* its full preclusive effect without regard to what the jury did not decide.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted.

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[1] Institutional affiliation is provided here for identification purposes only. The institutions themselves take no position regarding the issues raised herein.

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